No. 49229-6-II

Court of Appeals, Div. II,
of the State of Washington

In re Marriage of Ingersoll,

John Ingersoll,

Appellant,

v.

Tomi Lee Ingersoll,

Respondent.

Reply Brief of Appellant

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1. Introduction

The trial court abused its discretion in imposing restrictions on John without any findings of danger to the children. The trial court also abused its discretion in designating Tomi primary residential parent, even though she had admitted to multiple acts of domestic violence against John.

Tomi invites the Court to conflate John's anger and impulse issues with impairment due to alcohol, even though none of the evidence identifies a danger to the children resulting from John's occasional, moderate use of alcohol. In fact, there is no evidence that John uses alcohol at all when the children are with him. The restrictions are not supported by the required findings or by substantial evidence in the record.

Tomi asks the Court to ignore her history of domestic violence, arguing that the trial court made a proper credibility determination from conflicting evidence. However, Tomi's argument ignores her own admission to having threatened to kill John with a kitchen knife, among other things. The acts constituting Tomi's domestic violence were confirmed by her own admissions. No credibility determination was necessary. The trial court abused its discretion in ignoring these undisputed acts of domestic violence.

2. Reply Argument

2.1 The trial court improperly imposed restrictions on John under RCW 26.09.191 when there was no evidence that John's past alcohol issues would cause any harm to the children.

In his opening brief, John pointed out that a trial court can only impose restrictions under RCW 26.09.191(3) if the trial court finds that the parent's conduct poses a specific danger to the children. Br. of App. at 13-15. The trial court's boilerplate finding that John's alcohol use "gets in the way of his/her ability to parent," is insufficient as a matter of law. Br. of App. at 16-17. The finding was also not supported by substantial evidence in the record. Br. of App. at 17-18.

In response, Tomi argued that findings of specific harm are not required for a restriction under RCW 26.09.191(3)(c) and that the record contains sufficient evidence of impairment that interferes with parenting functions. Br. of Resp. at 16-24. Both assertions are incorrect.

2.1.1 A court cannot impose restrictions under RCW 26.09.191(3) without a finding that the impairment will cause specific harm to the children.

The requirement of findings of specific harm is found in *In re Marriage of Chandola*, 180 Wn.2d 632, 327 P.3d 644 (2014), in which the court stated, "we conclude that the legislature

intended RCW 26.09.191(3) restrictions to apply only where necessary to 'protect the child from physical, mental, or emotional harm.'" *Id.* at 648 (quoting RCW 26.09.002). "By requiring trial courts to identify specific harms to the *child* before ordering parenting plan restrictions, RCW 26.09.191(3) prevents arbitrary imposition of the court's preferences." *Id.* at 655 (emphasis in original). The court's holding is straightforward: before imposing restrictions under any of the "factors" in RCW 26.09.191(3), a trial court must find that the factor would cause specific harm to the child.

Tomi attempts to distinguish the factors in § 191(3)(a)-(f) from the catch-all provision in § 191(3)(g), arguing that specific findings are only required under the catch-all. Tomi's interpretation is inconsistent with the court's reasoning in *Chandola*.

In *Chandola*, the court did not distinguish the catch-all provision, but interpreted it as applying **in the same manner** as the other, listed factors. "When a statute employs such a general catchall term in conjunction with specific terms, the general term is deemed only to incorporate those things similar in nature or comparable to the specific terms." *Chandola*, 180 Wn.2d at 646-47.

The court also interpreted the statute in the context of related provisions and the statute as a whole.

> Thus, RCW 26.09.191(3)(g) must be read in light of chapter 26.09 RCW's statement of policy, codified at RCW 26.09.002. It provides that "the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as *required to protect the child from physical, mental, or emotional harm.*"

Chandola, 180 Wn.2d at 648 (emphasis added by the court). In other words, the legislature's statement of policy under the Parenting Act is that restrictions on a parent's conduct or time with a child should only be imposed as required to protect the child from some, identifiable harm.

The court continued,

> In light of this policy, as well as the nature of the specific grounds for parenting plan restrictions listed RCW 26.09.191(3)(a)-(f), we conclude that the legislature intended RCW 26.09.191(3) restrictions to apply only where necessary to "protect the child from physical, mental, or emotional harm," RCW 26.09.002, similar in severity to the harms posed by the "factors" specifically listed in RCW 26.09.191(3)(a)-(f). A trial court abuses its discretion if it imposes a restriction that is not reasonably calculated to prevent such a harm.

Chandola, 180 Wn.2d at 648. It is significant that the court applies this legislative intent to **all restrictions** under "RCW 26.09.191(3)," not only to the catch-all provision, RCW 26.09.191(3)(g). The court repeats this generalized holding

later in the opinion: "By requiring trial courts to identify specific harms to the *child* before ordering parenting plan restrictions, RCW 26.09.191(3) prevents arbitrary imposition of the court's preferences." *Chandola*, 180 Wn.2d at 655 (emphasis in original).

Tomi cites three cases to support her argument that no findings are required: *Marriage of Croley*, 91 Wn.2d 288, 588 P.2d 738 (1978); *Marriage of Dalthorp*, 23 Wn. App. 904, 598 P.2d 788 (1979); and *Marriage of Murray*, 28 Wn. App. 187, 622 P.2d 1288 (1981). All of these cases predate the Parenting Act of 1987 and interpret statutes that were repealed by that Act. They have no bearing on the interpretation of RCW 26.09.191(3). The three cases all deal with the factors for determining custody of a child under former RCW 26.09.190 (repealed). *See Croley*, 91 Wn.2d at 290-92; *Dalthorp*, 23 Wn. App. at 911-12; *Murray*, 28 Wn. App. at 188. Those factors are analogous to the current factors under RCW 26.09.187(3). *Compare Croley*, 91 Wn.2d at 290-91 *with* RCW 26.09.187(3). The § 187(3) factors must be considered on the record but not necessarily in written findings. In contrast, restrictions on a parent's conduct or residential time must be justified by findings of specific danger to the child.

In terms of RCW 26.09.191(3)(c), this requires a trial court to enter findings of the specific harm that is to be remedied

by the restriction—that is, how does the parent's alcohol impairment interfere with performance of parenting functions to a degree that presents a danger of physical, mental, or emotional harm to the child?

Although *Thompson v. Thompson*, 56 Wn.2d 683, 685, 355 P.2d 1 (1960), predates the Parenting Act, it illustrates the principle. In *Thompson*, the trial court awarded custody of the son to the father. *Id.* The mother appealed on the grounds that the father was "a drunkard." *Id.* The court found that "nothing in the record indicates that he [the father] has ever been intoxicated in public or that his drinking habit renders him incompetent in any way." *Id.* Appearing to conclude that the father, like John Ingersoll, was an occasional drinker, the court concluded, "While these traits are not commendable, we do not think that they so conclusively incapacitate the respondent to take proper care of the boy as to make it an abuse of discretion for the trial court to find that he was a fit and proper person to have his custody." *Id.*

To put it bluntly, a parent can consume alcohol without automatically becoming a danger to his child. Where there is a specific danger, the trial court should be able to identify it from substantial evidence in the record. Here, the trial court did not. Imposing restrictions without a finding of specific danger was an abuse of discretion and should be reversed.

2.1.2 The trial court's boilerplate finding that John's alcohol use "gets in the way of his/her ability to parent" is insufficient as a matter of law.

Here, the trial court did not make any findings that John's historic alcohol abuse was ongoing or that it was likely to pose a danger to the children. Instead, the court checked a box on the plain-language form that mirrored the language of the statutory factor without identifying any particular danger. CP 72; RP, June 15, 2016, at 22. As noted above, the trial court's finding is insufficient as a matter of law because it fails to identify any particular danger of physical, mental, or emotional harm to the children.

Tomi does not argue that the trial court's finding sufficiently identifies any harm. *See* Br. of Resp. at 20. She only argues that no specific finding is required. Because a finding of specific danger to the children is required, the trial court abused its discretion, and this Court should reverse.

2.1.3 The trial court's finding is not supported by substantial evidence.

Tomi argues that the finding was supported by substantial evidence, but none of the witnesses drew a connection between John's alcohol use and any specific danger of harm to the children serious enough to justify restrictions under § 191(c)(3). As the trial court noted, the testimony about John's parenting "was all very positive." 6 RP 1038.

Tomi points to a few pieces of testimony regarding John's impulsive personality and anger, most of which have no link to alcohol whatever. *See* Br. of Resp. at 22-24. K.A.I. reported that she was concerned with John's angry behavior on Skype visits. *Id.* at 22-23. F.M.I. would experience anxiety and nightmares before and after visits with John. *Id.* at 23. Shayle Hutchison testified that F.M.I. has a difficult relationship with John and that the relationship has caused F.M.I. trauma. *Id.* Cathcart testified that John had misused Skype visits. *Id.* at 23-24. None of these concerns have any nexus with alcohol use.

In fact, there is no evidence that John ever used alcohol during any visits with the children, including Skype visits. The only testimony is that John was never intoxicated when the children were around. 4 RP 734, 736; 5 RP 870. Even if John's impulsive behavior was an issue for the trial court, it was not an alcohol problem to be addressed under § 191(3)(c).

Tomi testified that John yelled and spanked the children when he was drunk, and that her greatest concern for the children during visits was John's behavior when he drank. Br. of Resp. at 22. F.M.I. reported that he was afraid when John drank. *Id.* at 23. However, again, there is no evidence that John ever consumed alcohol during visitation. Further, yelling and spanking does not rise to the level of a serious danger of

physical, mental, or emotional harm necessary to justify restrictions under § 191(3)(c).

Even Mr. Cathcart, who recommended the restrictions, did not identify any specific, serious danger to the children from John's alcohol use. To the contrary, Mr. Cathcart specifically testified, "I will say that between Ms. Corchoran's report – Ms. Cochran's reports, O'Connell's reports – Dr. O'Connell's reports, Dr. Stride's reports, Dr. Mays' report and my own observations, I do not believe that the children are at risk with John." 3 RP 477-78.

Cathcart noted that the Mays report, which stated that alcohol heightens John's impulsive behaviors, "doesn't particularly relate that to any specific incidents or anything having to do with Mr. Ingersoll." 3 RP 448. The record is devoid of any evidence of any specific, serious danger to the children's well-being from John's alcohol use.

The trial court abused its discretion in ordering restrictions under RCW 26.09.191(3)(c) without any findings or substantial evidence in the record of any danger of harm to the children. This Court should reverse the § 191 restrictions imposed on John in Parts 4, 5, and 8-11, and remand to the trial court to reconsider the Parenting Time Schedule and other provisions of the parenting plan.

2.2 The trial court improperly designated Tomi as the primary residential parent.

John's opening brief argued that the trial court abused its discretion in designating Tomi as the primary residential parent for two reasons. First, Tomi had engaged in a pattern of domestic violence, disqualifying her from being primary residential parent under RCW 26.09.191(1) and (2)(a). Br. of App. at 20-22. Second, the trial court improperly relied on the provisions of the temporary parenting plan in determining that Tomi would continue to be the primary residential parent. Br. of App. at 22-23.

2.2.1 The trial court's conclusion that Tomi had not engaged in domestic violence was contrary to law and not supported by substantial evidence.

Despite Tomi's protestations to the contrary, the trial court did, in fact, expressly find that neither parent had engaged in domestic violence:

> 3. **Reasons for putting limitations on a parent** (under RCW 26.09.191)
>
> a. **Abandonment, neglect, child abuse, <u>domestic violence,</u> assault, or sex offense.** …
>
> <u>Neither parent has any of these problems</u> requiring a limitation on parenting time.

CP 71-72 (bold emphasis in original; underline added). As John argued in his opening brief, this finding was contrary to law and not supported by substantial evidence.

Tomi does not argue against John's interpretation of the statutory language. A parent's time with the children **must** be limited if the parent has "a history of domestic violence" or commits a single "assault or sexual assault which causes grievous bodily harm or the fear of such harm." RCW 26.09.191. "A history of domestic violence" means a pattern of multiple instances of physical harm, bodily injury, assault, or the infliction of fear of the same.

Tomi argues that the evidence of domestic violence was all contested and that this Court cannot second-guess the trial court's "credibility findings and weighing of the evidence." Br. of Resp. at 34-36. However, not all of the evidence was contested. In fact, Tomi **admitted** to multiple acts of domestic violence. No credibility finding was necessary.

John's brief summarized the testimony on both sides of three separate incidents. Br. of App. at 5-8. Tomi admitted to pulling a kitchen knife and threatening to kill John. 1 RP 211. She admitted to pummeling John's chest, an assault that left bruises. 1 RP 207; 3 RP 578. Thus, at least two incidents of domestic violence were established by Tomi's own admissions.

While Tomi did not admit to choking John, her denial was not credible. *See* 1 RP 208. Other witnesses corroborated John's version of events, noting that Tomi struck "like a cobra" and choked John's neck for two to three seconds. 5 RP 858; 6 RP 942.

These three incidents constitute "a history of domestic violence" as defined by the statute. Alternatively, either the knife incident or the choking incident, alone, would qualify as "assault … which causes grievous bodily harm or the fear of such harm," under the second prong of the statute.

Because Tomi admitted to at least two of these incidents, the trial court's finding that she had not engaged in domestic violence is not supported by substantial evidence. There was no credibility determination for the court to make. The undisputed evidence was that Tomi threatened to kill John with a kitchen knife and engaged in other acts of domestic violence under the statutory definition. The trial court abused its discretion when it failed to find that Tomi had engaged in domestic violence.

Tomi's history of domestic violence required restrictions under § 191 and should have disqualified her from being designated primary residential parent.[1] This Court should

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[1] Tomi argues that restrictions under § 191 are dispositive of who should be primary residential parent. As argued above, the § 191(3)(c) restrictions imposed on John were improper and should be reversed. Similarly, the trial court's failure to impose § 191(1) or (2) restrictions on Tomi was improper and should be reversed. The result would be that **Tomi's** § 191 restrictions (for which limitations on parenting time are mandatory) are dispositive, and John should be the primary residential parent.

Even if John's restrictions are not reversed, § 191(3) limitations on parenting time are discretionary, not mandatory, and therefore would not be dispositive of who should be primary residential parent.

reverse and remand to the trial court to impose restrictions on Tomi under § 191, including designating John as the primary residential parent with sole decision making authority.

2.2.2 The trial court improperly based its decision on the children's residing with Tomi for four years under the temporary parenting plan.

The trial court stated in its oral ruling that the fact the children had lived for four years in Alaska with Tomi (under the temporary parenting plan) was a significant factor in the court's decision. 6 RP 1026. Tomi argues that the trial court's decision was based instead on the § 191(c)(3) restrictions on John, which left the parents in an unequal position in terms of determining which should be the primary residential parent. Br. of Resp. at 28-30. Tomi argues that the analysis of this issue comes down to whether the trial court used the temporary parenting plan to break a tie between the parents. *Id.*

While the "tie-breaker" analysis might be useful in some cases, it is not necessary where, as here, the trial court specifically stated that its decision was influenced by the temporary parenting plan. The trial court stated in its oral ruling,

> So while, on the one hand, the Court is not supposed to be looking at a temporary order in entering a final parenting plan, **one can't help but look at the circumstances that have existed for four**

> **years.** The children have lived primarily with Mom, and they've lived in Alaska, so **they've had a long distance relationship with their father for four years. That makes it very difficult for the Court to** – all things being equal, which I don't believe they are, but all other things being equal – **then say, Well, Dad would then become the primary residential parent.**

6 RP 1026 (emphasis added). This reliance on the temporary parenting plan is prohibited and is, alone, grounds for reversal.

Even if the decision were not based on this overt reliance on the temporary plan, the § 191(3)(c) restrictions on John were improper. As Tomi argues, it is those restrictions that led the trial court to conclude that all things were not equal. But **without** those restrictions, the parents' positions **would have been equal.** On remand, the trial court must understand that it cannot use the children's current residence with Tomi to break this tie.

3. Conclusion

The trial court abused its discretion in imposing restrictions on John under § 191(c)(3). It abused its discretion in failing to find that Tomi had engaged in a history of domestic violence. It abused its discretion in designating Tomi as primary residential parent.

This Court should reverse the parenting plan, including the § 191 restrictions against John in Parts 4-5 and 8-11 and the

findings of fact in Parts 3.a, 3.b and 16. This Court should remand to the trial court for entry of new findings supported by the evidence, imposition of § 191 restrictions against Tomi, designation of John as primary residential parent, and reconsideration of the Parenting Time Schedule.

Respectfully submitted this 10th day of April, 2017.

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I certify, under penalty of perjury under the laws of the State of Washington, that on April 10, 2017, I caused the foregoing document to be filed with the Court and served by the method indicated below:

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Reply Brief of Appellant

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